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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-830

N. DALE ANDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OCTOBER TERM, 1974

No. 74-

N. DALE ANDERSON,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, N. Dale Anderson, respectfully prays that a writ of certoriari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 4, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* at 28) has not been reported. The opinion of the

United States District Court for the District of Maryland (App. A, *infra* at 17) has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 4, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Petitioner was denied his sixth amendment rights to compulsory attendance of witnesses at his criminal trial, effective assistance of counsel and his fifth amendment right to due process of law when he was not granted a complimentary right of use immunity, where the prosecution adduced all inculpatory evidence against the defendant only by virtue of conferring use immunity on its witnesses pursuant to 18 U.S.C. §6001 *et seq.*, where all possible witnesses were involved in some sort of illegal activity and where the prosecution used implied promises of immunity or the threat of indictment to discourage the appearance of defense witnesses.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition presents a fifth and sixth amendment challenge to the constitutionality of the Federal Use Immunity Statute which was passed as part of the Organized Crime Control Act of 1970, P.L. 91-452, 18 U.S.C. §6001 *et seq.* (1970). Also involved are provisions of the Criminal Code of the United States including the Hobbs Act, 18 U.S.C. §1951 (1970), and 26 U.S.C. §7201

(1970) which relates to criminal federal income tax evasion. These constitutional and statutory provisions are reprinted in Appendix B to this Petition.

STATEMENT OF THE CASE

Petitioner, N. Dale Anderson, the former County Executive of Baltimore County, Maryland, was convicted in the District Court for the District of Maryland on 32 counts of an original 43 count indictment on March 20, 1974. The Petitioner was convicted of one count of conspiring to extort monies under "color of official right," 18 U.S.C. §1951, from architects and consultant engineers doing non-bid consulting work for Baltimore County, of 27 counts of actual collection of monies through his alleged agent, William E. Fornoff, 18 U.S.C. §1951, and of 4 counts of income tax evasion fer not reporting the monies received, 26 U.S.C. §7201. Anderson from 1966 until his conviction was the County Executive of Baltimore County. An enormously popular, conservative Democrat, Anderson was blunt and forthright and well-known for his pugnacity, particularly with the federal government over various programs for Baltimore County.

Petitioner's trial took twelve weeks, produced 8500 pages of transcript and over 400 documentary exhibits. On appeal to the Fourth Circuit, legal questions were extensively briefed and argued. The Fourth Circuit affirmed in a 3 sentence *per curiam* opinion and did not address any of the substantive issues raised including the constitutionality of the one-sided character of the recently enacted federal use immunity statute, 18 U.S.C. 6001 *et seq.*, which the prosecution used to establish its entire case.

In each instance, the prosecution's evidence was that William E. Fornoff, the Baltimore County Ad-

ministrative Officer under Anderson, had collected money from various architects and engineers which Fornoff claimed to have delivered to Anderson. There was no evidence that Anderson ever received money directly from any architect or engineer of the seven companies involved or from any other architect or engineer. Rather, the proof relied upon the immunized Fornoff testimony that he had given the money in its entirety, at unspecified times, and in unspecified amounts (Fornoff never opened the white envelopes in which the money was delivered during the seven years of this extortion conspiracy to check the amount) to Anderson.

Another immunized prosecution witness, Joel Kline, established the prosecution's net worth tax case by testifying that what appeared as loans from Kline to Anderson were, in fact, not loans but rather a "laundering" operation which Kline and Anderson used to disguise a total of one hundred thousand dollars ($100,000.00) of cash money that Anderson had in his possession.

The prosecution characterized Dale Anderson throughout as a corrupt politician who presided over a "system" in Baltimore County, Maryland. The principal feature of this "system" was a pattern of extortion by or bribery of public officials by various engineering and architectural firms resulting in favored status in the award of public non-bid engineering and architectural contracts. Evidence at trial indicated that there was a group of public officials and private businessmen who did develop a "system" for their mutual benefit. In Baltimore County, Maryland, the group began years before Anderson's election as County Executive during the term of Republican County Executive Spiro T. Agnew. It developed that Agnew would award contracts

to those who would provide a five percent (5%) kickback to him. When Mr. Agnew became Governor of Maryland in 1966, the "system" was transferred to the state level, and Agnew later received further payments after he became Vice President of the United States.

The Agnew group included Lester Matz and Jerome B. Wolff who, as consulting engineers, paid the Agnew administration in return for work. Both Matz and Wolff, close social friends of Agnew, were prominent prosecution witnesses against Anderson. Another Agnew confidante, I. H. Hammerman, II, served as Agnew's "bagman" while Agnew was governor and Jerome Wolff, then Agnew's appointed State Roads Chairman, awarded state contracts appropriately and shared the money with Agnew and Hammerman.

One feature of the "system" in Baltimore County — in addition to the clear violation of the criminal tax laws by public officials and businessmen alike — was the long-standing contacts, the familiarity and social friendship which existed among those involved. The individuals, who participated in the Baltimore County "system" under Agnew, had been friendly, in some instances, since the mid-1950's and, in every instance, since the Agnew administration in the County. Anderson was a Democratic County Councilman during the Agnew term as County Executive and, as a member of Agnew's political opposition, was not intimate with those in that administration. In fact, his opponent in his 1966 race for County Executive was an Agnew friend who had served as Agnew's County Solicitor.

Also serving in the Agnew administration as County Administrative Officer was the principal witness against Anderson, William E. Fornoff. Mr. Fornoff later served in the same capacity under the Democratic Administration of Anderson as he had under Mr. Agnew.

Mr. Fornoff, in addition to being the man in charge of everyday operations in Baltimore County, had been a close friend of both Wolff and Hammerman since the 1950's. Fornoff characterized his relationship with them as being that of a "family". Another engineer who, according to Fornoff, paid him during Anderson's terms was John Hocheder, a fishing and hunting companion of Fornoff's, who approached Fornoff early in Anderson's term and suggested a willingness to make contributions. Fornoff, Wolff, Matz and Kline were four (4) of the fifteen (15) immunized by the prosecutors in this case.

In every instance, the evidence against Dale Anderson was adduced from or dependent upon witnesses who received either use immunity in exchange for their testimony or who benefited from favorable treatment in the form of understandings in spite of their admitted criminal activity. Except for the Internal Revenue Special Agent (his testimony was predicated substantially on acceptance of the testimony of the immunized Joel Kline), the witnesses who provided inculpatory information were immunized from prosecution. Fifteen (15) witnesses received use immunity pursuant to 18 U.S.C. §6003. Four (4) of these fifteen and two (2) others were given "no prosecution" agreements. Only one (1) of these seventeen (17) pled guilty to any charge and he (Fornoff) was not sentenced to jail due to government ministrations. His probation has now been suspended. The defense had no complimentary power to immunize witnesses. In fact, when the defense attempted to call an official of a company involved in this case, who was initially prepared to deny the allegations of one immunized prosecution witness (Wolff), he later advised that he would take the fifth amendment since the prosecution refused to "clarify" his status when he indicated a willingness to testify for the Petitioner.

REASONS FOR GRANTING THE WRIT

This case presents to this Court a situation where a recently enacted Congressional statute has operated to effect a structural imbalance against a criminal defendant in the federal criminal system. Moreover, it is an imbalance which operates to deny to a criminal defendant the ability to present witnesses in his own defense or to have effective assistance of counsel. In this case, federal prosecutors employed the use immunity statute, 18 U.S.C. §6001 *et seq.*, on 15 separate occasions in order to adduce evidence which was inculpatory of the Petitioner. In point of fact, every item of inculpatory evidence against the Petitioner was presented only by virtue of this use immunity statute. Even the Internal Revenue Special Agent who testified as to the Petitioner's "net worth" in the tax evasion aspect of the case admitted that his testimony was substantially predicated on acceptance of the testimony of the immunized Joel Kline. It is beyond preadventure to say that without the benefit of use immunity there would have been no case against the Petitioner.

It is equally true that since the Petitioner did not have the same right to immunize witnesses, his defense was irreparably damaged. For instance, when the Petitioner attempted to call one defense witness who was initially prepared to specifically deny certain allegations of an immunized prosecution witness, he was informed that the witness would take the fifth amendment because the prosecutors had refused, at his request, to "clarify" his criminal status. In short, the one-sided character of 18 U.S.C. §6001, *et seq.* enabled federal prosecutors below to obtain a conviction, while at the same time, denying to Petitioner a full and a fair defense.

Until October 15, 1970 when the use immunity statute was enacted as a part of the Organized Crime Control Act of 1970, P.L. 91-452, Congress had never delegated to federal prosecutors the right to grant immunity in all criminal cases. In fact, until 1968 immunity was not authorized in any Hobbs Act prosecution. *See* 18 U.S.C. §§2514, 2516 (not in force after December 15, 1974). Now, a federal prosecutor, with the approval of the Justice Department, may immunize at will. Whatever the merits of granting the prosecution such an immunity power, it is apparent that this immunity power can be exercised in a matter which is not consonant with constitutional guarantees.

The Bill of Rights was designed to balance the forces in a criminal prosecution and hence improve the reliability and integrity of the fact-finding and guilt-determination process. "Just as an accused has the right to confront the prosecution's witnesses . . . he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Even absent the specific guarantee in the sixth amendment, the right to present relevant evidence in defense is a "fundamental requirement of fairness" for criminal trials inherent in the due process clause of the fifth amendment. *Rovario v. United States*, 353 U.S. 53, 60 (1957). "[I]t is clear that the sixth amendment's right to compulsory process is violated by the prosecution sending a witness beyond the jurisdictional reach of a court's compulsory process." *United States v. Wolfson*, 322 F. Supp. 798, 819 (D. Del. 1971), *aff'd*, 454 F. 2d 60 (3rd Cir. 1972), *cert. denied*, 406 U.S. 924 (1972). Here, the granting to the prosecution of the power to compel testimony in exchange for immunity, coupled with the denial of such a power to the defense, constituted as

effective and as improper a bar to defense evidence as if the witnesses had been sent beyond the court's jurisdictional reach. This observation is particularly germane where, as the district court below noted, "virtually all the possible witnesses . . . in this case were involved . . . in some sort of illegal activity." App. A, *infra* at 18.

The specific intent of the compulsory process clause was to place the criminal defendant on an equal footing with the government in eliciting testimony. In the early case of *In re Dillon*, 7 F. Cas. 710 (No. 3914) (N.D. Cal. 1854), a California district court held that a criminal defendant had no right to compulsory process on the French consul who was diplomatically immune from process because the government itself could not have subpoenaed the consul either, and that the purpose of the sixth amendment was *"to place the accused in a position to make his defense and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government in establishing his guilt."* 7 F. Cas. at 712 (emphasis supplied). "The history and purpose of this clause [compulsory process] . . . militate in favor of immunization [by the defendant]." Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953, 956, n. 19 (1967).

Since a criminal trial is a search for truth, the denial to the defendant of the right to immunize witnesses so that all the evidence may be presented, where such a power exists in and is used by the prosecution constitutes a denial of due process of law. In *Earl v. United States*, 361 F. 2d 531 (D.C. Cir. 1966) *rehearing denied*, 364 F. 2d 666 (D.C. Cir. 1966) (en banc), Chief Justice Burger (then Circuit Judge Burger) held that the mere existence of a power to immunize in the prosecution,

without the actual exercise thereof, did not constitutionally mandate that a complimentary power of immunity be given a criminal defendant. However, in a footnote to the opinion Chief Justice Burger observed that:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute as applied denied him due process. *Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.* Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government.

Earl v. United States, supra, 361 F.2d at 534, n. 1 (emphasis supplied).[1] Indeed, Judge Leventhal, in commenting on the denial of the petition for rehearing en banc in *Earl,* also noted that "the immunity statute was passed in furtherance of the search for truth; that quest would seem to extend to evidence favoring a defendant." *United States v. Earl, supra,* 364 F.2d at 666.

At least fifteen (15) potentially favorable witnesses for the defense were implicated in criminal activity either by prosecution witnesses or by the prosecutors in their Opening Statement to the jury (the government would not sponsor those "liars" who refused to cor-

[1] It would be unthinkable to deny to a criminal defendant's lawyer a power of subpoena when the prosecution used a subpoena power to produce its witnesses. It is equally wrong to deny the defendant a method of producing evidence which the prosecution uses freely to produce its own evidence.

roborate details of Fornoff's story). None of these 15 were called by the government (they were "liars").[2]

Even though these 15 witnesses existed, it became a moot exercise to call them. First, the defense had no way of granting them immunity. Second, the court could not have conferred immunity at the defendant's request as that would have presented insurmountable article III difficulities. *Ullman v. United States*, 350 U.S. 422 (1956) As Chief Justice Burger observed in *Earl v. United States, supra*, 361 F.2d at 534:

> We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the government is beyond our power. (footnote omitted)

Accord, United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973). In addition, the district court had no power to order the government to confer immunity. *United States v. Berrigan, supra; Cerda v. United States*, 488 F.2d 720, 723 (9th Cir. 1973); *Terrell v. United States*, 294 A.2d 860 (D.C. App. 1972).

Even if the district court had the power to order immunity for defense witnesses, it is clear that the government would have resisted such an order. First, in their opening statement to the Anderson jury, they had already characterized those engineers who had refused to

[2] On the morning of Tuesday, March 5, 1974, the prosecution concluded its case. Two days earlier on Sunday, March 3, 1974, an article appeared in the Sunday paper written by Robert A. Erlandson, appropriately entitled *"Federal Prosecutors Ponder, After Anderson Trial, Who's Next?"* Baltimore Sunday Sun at A. 20, col. 4. The defense began its case on the afternoon of Tuesday, March 5, 1974, by calling certain witnesses, unable to call certain others (Who's Next?).

acknowledge payments to Fornoff (or, perhaps, who had claimed that such payments were made to Fornoff in his own right or that such payments were in the nature of bribes rather than products of extortion or that such payments were legitimate campaign contributions) as "liars."[3] Second, it is a matter of judicial notice that, of the fifteen potential defense witnesses alluded to above, three have been subsequently indicted by the same prosecutors. Those three are Hocheder, Overton and Hsi (Hocheder and Hsi pled guilty, Overton was acquitted in a trial where Fornoff was the principal prosecution witness). Third, the prosecution refused to "clarify" the status of an officer of one engineering company when he expressed a willingness to appear on behalf of the defense to deny a specific statement of an immunized prosecution witness.

In *Bray v. Peyton*, 429 F.2d 500 (4th Cir. 1970) the Fourth Circuit, on habeas corpus review, overturned a

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[3] The stories of the "liars" are legally significant. If their payments to Fornoff were bribes, a Hobbs Act prosecution would not lie even as to Fornoff. The Hobbs Act, 18 U.S.C. §1951, proscribes extortionate activity (not bribery) and its definition of extortion is borrowed from New York Law. *United States v. Nedley*, 255 F.2d 350 (3rd Cir. 1958). Under New York law, the crimes of bribery and extortion are mutually exclusive. One who pays a bribe is equally as guilty as the one who receives it "which could never be the case with extortion." *People v. Dioguardi*, 8 N.Y.2d 260, 273, 203 N.Y.S.2d 870, 881, 168 N.E.2d 683, 692 (1960). Federal courts have recognized this distinction in Hobbs Act prosecutions. In *United States v. Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965) jury verdicts of guilty were set aside and new trials ordered as to Hobbs Act defendants because the evidence demonstrated bribery and not extortion. *See also United States v. Critchley*, 353 F.2d 358 (3rd Cir. 1965).

To the extent these payments were legitimate campaign contributions, the Hobbs Act was not violated. Anderson admitted that he had received cash from Fornoff during election years which were represented as contributions.

state rape conviction. In *Bray* two defendants had been originally charged with rape of a minor female but the charge had been dropped as to one of the defendants when he entered the Army. At the trial of the remaining defendant, the defendant whose charges had been dropped appeared in the courtroom to testify with respect to the reputation of the minor girl since the applicable Virginia statute permitted the jury to reduce the crime from a felony to a misdemeanor if it decided that the minor had been a "lewd minor female." Upon the appearance of this witness, the prosecutor placed him under arrest. *Two other witnesses for the defendant who were to testify as to the reputation of the girl in question, upon seeing the prosecutor's behavior toward the initial defendant, refused to testify even though they had no fear of arrest.* "The arrest of their fellow witness cooled [their] willingness [to testify]." *Bray, supra,* 429 F.2d at 501. The Fourth Circuit citing *Washington v. Texas,* 388 U.S. 14 (1967), noted that the sixth amendment includes the "right to put on the stand a witness who is physically and mentally capable of testifying to events that he had personally observed. . . ." 429 F.2d at 501-502.

The prejudice resulting from the fact that a criminal defendant cannot immunize witnesses in his defense is further compounded by the standard instructions given as to witnesses who do not testify. The court below gave the standard charge:

> If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, the failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party.

In the absence of immunity, those witnesses who may have appeared to the jury to be "peculiarly within the power" of the defense in terms of material and relevant knowledge were, in reality, outside of the defense's power to the extent that they were either directly or indirectly involved in criminal activity.

The prosecutors have argued below that the defendant should not be given immunity power as it would then be subject to abuse since the defendant is interested in his freedom while the government is interested only in the fair administration of justice and of the law. Yet the granting of an immunity power to the defendant would not result in its profligate use in that the prosecutor would maintain the power to indict witnesses for the defendant for any perjury they committed on the stand. The government maintains this right to prosecute for perjury even as to its own witnesses who testify under immunity.[4]

The use of 18 U.S.C. §6001 *et seq.* introduced a structural imbalance in this criminal case. This Court has corrected time and again structural imbalances in the criminal justice system which operated to frustrate the exercise of constitutional rights. The criminal defendant has a right to a lawyer who can match wits with the government's lawyer, *Johnson v. Zerbst*, 304 U.S.

[4] The prosecutors conceded in their brief to the Fourth Circuit "an unusually extensive application of the new federal use immunity statute" but explained it as necessary since Sam Green, the States Attorney for Baltimore County, indicated he was going to pursue his own state corruption probe against the businessmen involved (i.e. federal witnesses against Anderson). For a variety of legal reasons, Green's "threat" was ludicrous on its face. Practically it was more absurd as (1) Green himself was under State indictment, (2) was convicted one month before Anderson and (3) was not able to indict even his own accuser. Not unexpectedly, the Green corruption investigation did not materialize.

458 (1938). The criminal defendant has a right to a lawyer to check police behavior at a post-indictment lineup, *United States v. Wade*, 388 U.S. 218 (1967); *Kirby v. Illinois*, 406 U.S. 682 (1972). When the police or prosecutor attempts to secure a confession in a custodial atmosphere they are required to first tell the interrogated party of his rights or forego the use of the statement, *Miranda v. Arizona*, 384 U.S. 436 (1966). Even long accepted rules of evidence which operate to imbalance a criminal trial (without the aid of the police or the prosecutor) can run afoul of the Constitution. *Bruton v. United States*, 391 U.S. 123 (1968) (where co-defendant did not testify but his confession which implicated Bruton was introduced as an admission against interest, Bruton was denied his sixth amendment right of confrontation even where limiting instruction was given to jury); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (failure of state law to recognize declaration against penal interest exception to hearsay rule operated to deny criminal defendant due process) . . . In short, the Constitution requires that the criminal defendant be on substantially equal footing with the police and prosecutors in presenting his defense at all stages of the formal criminal process. The Petitioner was here denied a substantially equal footing with his prosecutors by a one-sided immunity statute which could only be used to establish his guilt.

One remedy for the lack of a complimentary right in the immunity statute might be a formal instruction to the effect that the defendant did not have the right to immunize witnesses on his behalf and that the government would not grant him such a right. *See* similar suggestion of Judge Leventhal in *Earl v. United States, supra*, 364 F.2d at 666. It is now the time to create some remedy lest federal prosecutors are allowed by virtue of

this immunity legislation to make mockery of the balanced and fair adversary system of criminal justice which the Constitution and this Court have traditionally guaranteed.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January, 1975

APPENDIX A

Opinions and Judgments Below

In The
United States District Court
For The District of Maryland

No. 73-0527-Y Criminal

United States of America
v.
N. Dale Anderson
Baltimore, Maryland
April 19, 1974

(The Court) The defendant has filed a motion for judgment of acquittal, or in the alternative for a new trial, and the Government has had an opportunity to respond to the memorandum filed on behalf of the defendant in support of the motion. Counsel have, today, been afforded the opportunity to be heard in argument on the motion; Mr. Ramsey having spoken for the defendant, and Mr. Skolnik for the Government.

As I am satisfied that this matter should be concluded at the earliest possible date, giving full consideration to an opportunity for all parties to be heard, I have determined that the matter should be disposed of at this time by an oral opinion, rather than holding the matter for any further consideration.

A motion for judgment of acquittal should be granted where "the evidence is insufficient to sustain a conviction." This is the language, of course, of Rule 29(a) of the Federal Rules of Criminal Procedure. As formulated

by the Fourth Circuit Court of Appeals in United States v. Sherman, 421 F.2d 198, at pages 199 and 200, the rule is that: "The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support the finding of guilt. Glasser v. United States, 315 U.S. 60, at page 80. Where the evidence construed most favorable for the Government is such that the jury might find the defendant guilty beyond a reasonable doubt, then the evidence is sufficient to sustain a finding of guilt."

This Court is convinced that the evidence taken in the light most favorable to the prosecution is such that the jury could well find the defendant guilty beyond a reasonable doubt. Accordingly, the motion for judgment of acquittal must be denied.

In the alternative to the granting of the motion for acquittal, the defendant also seeks a new trial, setting forth a number of grounds for that alternative motion.

The defendant has challenged the Federal use immunity statute, which is 18 U.S.C. 6001 and the sections there following, on the ground that in the context of this case, the inability of the defense to immunize witnesses denied the defendant his Sixth Amendment right to compulsory process of witnesses, and his Fifth Amendment right to due process of law. Since virtually all the possible witnesses of any significance in this case were involved in one way or another in some sort of illegal activity, defendant contends that the ability of the prosecution to immunize witnesses whose testimony implicated the defendant, without a corresponding right on the defendant's part to immunize witnesses who might have been able to exculpate the defendant, made the defendant's right to compulsory process as empty as if those potentially favorable witnesses had been physically out of the Court's jurisdiction.

In support of this argument, the defendant's memorandum relies principally upon the Supreme Court case of Washington v. Texas, 386 U.S. 14, decided in 1967. The Court there held that a Texas statute

which prevented an alleged accomplice in a crime from testifying for a defendant denied the defendant his Sixth Amendment right to compulsory process. Discussing the nature of the right to compulsory process, the court said, and I quote:

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

It should be noted, however, that the Court also stated, in a footnote to its holding in that case, the case of Washington v. Texas, "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination * * *." Citing the Washington case, 388 U.S. at 23, footnote 21.

The defendant's argument is not premised on his inability to obtain the physical presence of potentially favorable witnesses, but rather upon the belief that without immunity such witnesses would have been unwilling to testify and would have asserted their Fifth Amendment privilege. Defendant has not, however, made any proffer of the favorable testimony of any such witnesses, with the exception of the affidavit which is attached to the motion, referring to officials of the Greiner Company, nor did the defendant during trial assert this need to be able to obtain immunity for defense witnesses.

Presuming it to be true that these witnesses would have refused to testify if called, it has been held in several cases that a defendant's right to compulsory process is not violated simply because a defendant witness chooses not to testify on the grounds of his

Fifth Amendment privilege. I refer to Holloway v. Wolfe, 351 F. Supp. 1033 at 1038; reversed on other grounds in 482 F.2d 110; Smith v. United States, 385 F.2d 34 at page 38, nor does this constitute a violation of a defendant's right to due process. Referring to Ramirey v. United States, 294 F.2d 277 at 284. And where it appears that a witness, if called, would refuse to testify, it is not an abuse of discretion for a trial Court to deny a defendant's motion for a writ of habeas corpus ad testificandum. Referring to Murdock v. United States, 283 F.2d 585, and in Ramirey, referred to above, the Ninth Circuit said:

"We refuse to adopt a rule of law to the effect that appellant has been deprived of the right of due process merely because other persons who might aid his cause, have, in refusing to do so, claimed the protection of a constitutional privilege which undeniably is theirs."

The Defendant suggests that the immunity statute was not intended for use in the manner or to the extent that it was here implemented and that it was this excessive use of immunity which makes the statute unconstitutional for failing to allow the Defendant the same power. This Court is not aware of any support for this position either in reason or the law. The history of immunity statutes was discussed at some length by the Supreme Court in Kastigar v. United States, 406 U.S. 441, which upheld the constitutionality of the use immunity statute here involved (though under an entirely different attack). The Court found that immunity statutes, and I quote:

"* * * seek a rational accommodation between the imperatives of the privilege and the legitimate demands of Government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses, and their primary use has been to investigate such offenses.* * * The commentators, and this Court on

several occasions, have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in Ullman v. United States, 350 U.S. 422, such statutes have 'become part of our constitutional fabric,'"

A footnote in that case reveals that the types of offenses referred to by the Court are "chiefly those whose proof and punishment were otherwise impracticable such as political bribery, extortion, * * *." Referring again to 406 U.S. at 447, quoting Murphy versus Waterfront Commission, 378 U.S. 52 at page 92.

If, as the Supreme Court opinion in Kastigar suggests, due to the character of these offenses, "the only persons capable of giving useful testimony are those implicated in the crime," it can hardly be surprising that all of the major Government witnesses in this case were implicated in some illegal activity. And, that being the case, it is equally understandable that in order to obtain their testimony, the prosecution was forced to obtain for them use immunity. The Government, in its answer to Defendant's motion, has suggested additional reasons why extensive use of immunity was required in the instant case, and has referred to the newspaper publicity by other elected officials in the State in connection with the need for such immunity.

In the case of In Re Kilgo, decided by the Fourth Circuit in 1973 and cited at 484 F.2d 1215, Judge Butzner speaking for the Court said the Sixth Amendment assures an accused of compulsory process to obtain witnesses, but the authors of the Bill of Rights did not deem it essential to enhance this right by empowering accused to confer immunity upon witnesses called.

It should be noted that under the procedures directed by Congress requests for immunity can only be made with the prior approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General. Thus, the prosecutors in the field are

required to justify each request for immunity to a senior official of the Justice Department.

The use immunity statute, Title 18, U.S. Code, 6001 and following, as applied throughout the course of Defendant's trial did not violate his rights under the Fifth and Sixth Amendments to the constitution.

The Defendant's next ground for a new trial is that the over conduct of the prosecution throughout this case was so improper as to amount to a violation of Defendant's due process rights. More specifically, it is argued that the prosecutors acted improperly by presenting their entire case through immunized witnesses; by, in some cases, inducing a change in a witness' story by a threat of a perjury indictment; by keeping witnesses away from the defense either by explicit instructions or by the more roundabout way of refusing to "clarify" statutes on the implied threat of indictment; by jury "selection," and by sponsoring as reliable witnesses who had first exculpated the Defendant completely and then changed their testimony.

Referring briefly to each of these grounds, I would make the following comments. First, as to the immunized witnesses: the fact that the prosecution's major witnesses, with the exception of the Internal Revenue Agents, testified under use immunity did not constitute a violation of Defendant's due process rights. As the Supreme Court noted in Kastigar, as I cited earlier, "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime," although it is unfortunate that individuals involved in illegal activities must be granted immunity in exchange for their testimony, the prosecution is charged with the responsibility of enforcing the law and on occasion enforcement of the law requires reliance upon unsavory individuals.

The Defendant states in his motion that "When, as here, every element of the crime charged is proven from the testimony of immunized criminals, the Defendant is

denied his right to be proven guilty beyond a reasonable doubt." While it is true that the testimony of an immunized witness should be considered with greater care than that of an ordinary witness, the jury's attention was drawn to this fact at some length by defense counsel, and it was also made clear through final instructions to the jury. The jury was also fully instructed as to the requirement of proof beyond a reasonable doubt.

As to testimony by intimidation, the defense implies that some of the prosecution witnesses were intimidated into testifying against the Defendant by threats of possible perjury prosecution. As the Government points out, the defense was provided at trial with all materials required under the Jencks Act, Title 18, U.S. Code, Section 3500, which included all prior inconsistent statements of any witness. The motivation for or the weight to be given the testimony of these witnesses was properly a matter for the jury, and it was so treated by the defense at trial. There is no indication of misconduct in this regard on the part of the Government which could possibly be considered to be so prejudice to the Defendant as to deny him due process of law.

Next, the issue of the defense witnesses. The defense also charges that the Government, by subpoenaing potential defense witnesses and announcing pending indictments in its continuing investigation, made these potential defense witnesses unavailable to the defense. The fact that all individuals who received subpoenas from the Government were not called at trial does not support the inferences which Defendant attempts to draw from it. The Government flatly denies that there was any attempt on its part to "scare off" potential defense witnesses, and there is nothing, aside from defense's conjecture, which would indicate otherwise. As to the newspaper stories concerning impending indictments, they are not specifically identified by the defendant, nor are they in any way linked to the Government.

The defendant does not allege that he was in any manner prevented from summonsing any "potentially favorable witness." And, although he does allege that the Government instructed a certain witness, an accountant, not to talk to the defense, it does not appear that the incident referred to in context was in any way improper, nor did it result in any substantial prejudice to the defendant.

As to jury "selection," a further act of misconduct the defendant alleges is that the Government acted improperly in regard to selection of the jury. Specifically, it is alleged that the prosecution ordered "tax runs" on jurors after it had indicated at a pretrial conference that it would not, and, further, it is implied a tax audit on one of the alternate jurors was somehow instigated by the prosecution. The Court is satisfied that the prosecution played no part in the untimely audit of the alternate juror. At the pretrial conference to which the defense refers, there was some reference to tax runs, but the Court does not recollect any formal Government representation that no tax runs would occur. It is quite clear from the voir dire conducted in open court that such information was available.

The instructions given by the Court in relation to immunity are challenged by the defendant on two grounds: first, that they were not strong enough in light of the extent to which immunity was used throughout the trial, and, secondly, that the appearance was created that it was the Court's decision to grant the immunity rather than the prosecution's.

The Court has reviewed the instructions given in respect to immunities and is satisfied that they were correct. Refer to United States v. Leonard, 100 Daily Washington Law Reporter, 417, an opinion written by Judge Winter of the Fourth Circuit Court of Appeals in January of 1974. At one point in its instructions, this Court stated: "A witness ordinarily may not be compelled to give testimony which may tend to incriminate him. However, the Court may, upon request of the

Government, and when the Court feels it to be appropriate, grant to a witness what is known as a use immunity." The defendant questions the propriety of the language "and when the Court feels it to be appropriate."

Several observations are in order in respect to this argument. First, the Court does have the duty to ensure that an immunity application complies with the statutory requirements of 18 U.S. Code 6003, and I refer to In Re Kilgo, referred to earlier, and must, therefore, satisfy itself that the application is "appropriate." Thus the language defendant objects to was correct. Secondly, the defendant although excepting generally to the Court's immunity instruction on the ground that it was not forceful enough, did not raise the socalled appropriate objection when he took exceptions to the instructions. Rule 30 of the Federal Rules of Criminal Procedure, provides in pertinent part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Defendant failed to comply with this requirement and should not now be heard to raise this issue. Further, the defendant argues, as properly he should, to the jury that the immunity was granted by the Government. From the instructions, considered in proper context, this portion of the instruction was a proper one, and there is no reason to assume that the jury misinterpreted the language of the instruction.

Referring next to the instruction relating to bribery and extortion, the defendant has challenged the Court's instructions relating to the distinction between bribery and extortion in a Hobbs Act prosecution. The defendant maintains that in light of the fine line between extortion and bribery, which existed as to several of the illegal payments, the Court should have given a stronger bribery and extortion instruction than was given.

The Court is satisfied that the instruction given clearly stated the bribery-extortion distinction. The Court noted carefully, at page 8660 of the transcript, that the offense defined by the Hobbs Act could only be committed either by the wrongful use of fear or under the color of official right. "Fear" was defined as "a state of anxious concern, alarm, apprehension of anticipated harm to a business or a threatened loss * * *." "Under color of official right" was defined as "the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear." This language was expressly approved in United States v. Kenny, 462 F.2d 1205 at page 1229.

Further more, at page 8666 of the transcript, the Court noted "voluntary payment * * * unaccompanied by any fear of economic loss, would not constitute extortion. Unless the payments here alleged were made under some form of compulsion, there is no violation of the law within the charges set out in the indictment." Again, this language was approved in United States v. Addonizio, 451 F.2d 49, pages 77 to 78.

The Court clearly expressed the requirement that the jury find that the illegal payments were induced by the wrongful use of fear as defined or under color of official right, as defined. Voluntary payments do not constitute a violation. It is not necessary for the Court to mention the word "bribery", nor to instruct in detail as to the elements of the offense. Refer again to United States v. Addonizio. The Court's instructions constitute an accurate and adequate statement of the law.

Another argument advanced by Defendant in support of his motion is that the Court erred in failing to direct the Government to produce Brady material, and also in failing to conduct an in camera inspection of possible Jencks Act materials. Although not convinced it was necessary to do so, and I refer to United States v. Anderson, 481 F.2d 685 at 690, the Court in order to put to rest any problem which may exist in this respect, has now conducted an in camera examination covering the

materials referred to by Defendant in his motion. The greatest portion of these documents that have been submitted to the Court have been given to the Clerk and marked as Court's Exhibits for the purpose of this hearing and will be available for future perusal if necessary. Certain additional items are to be submitted to the Court today, and if that further review indicates any Jencks material, counsel will be notified promptly. On the basis of the review conducted at this time, the Court has determined that the production of materials involved was not required under Brady v. United States, 373 U.S. 83, or under the Jencks Act. Assuming, however, that the materials involved, or any part of them, could properly be considered Jencks material, and it was, therefore, error not to require its production to the defense, the Court is satisfied, after reviewing the materials, that any such error could not be prejudicial to the Defendant.

On a motion for new trial, unlike a motion for acquittal, the Court may weigh the evidence and consider the credibility of the witnesses. Refer to United States v. Leach, 427 F.2d 1107, also 2 Wright, Federal Practice and Procedure Criminal, Section 533: "If the Court reaches the conclusion that the verdict is contrary to the evidence, or its weight, and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted." Referring to United States v. Morris, 308 F. Supp. 1348. The Court has reviewed the evidence in the instant case and it is more than sufficient to justify the verdict that was returned.

For the aforegoing reasons, the Defendant's motion for judgment of acquittal, or in the alternative for a new trial, is denied.

I hereby certify that the aforegoing is a true and accurate transcript of the Court's Oral Opinion in the aforementioned case.

FRANK FIGIEL,
Chief Official Reporter.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1694

United States of America,

Appellee,

versus

N. Dale Anderson,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore
Joseph H. Young, District Judge

Argued November 8, 1974.

Decided December 4, 1974.

Before Haynsworth, Chief Judge, and Butzner and Russell, Circuit Judges.

Per Curiam:

A jury convicted N. Dale Anderson of one count of conspiracy to extort and twenty-seven counts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1970), and four counts of federal income tax evasion in violation of 26 U.S.C. § 7201 (1970). Anderson appeals, raising a constitutional claim about the use immunity statute, 18 U.S.C. § 6001 (1970), and asserting a number of errors at his trial.

Upon consideration of the briefs, record, and oral argument, we find no reversible error and affirm the judgment of the District Court.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1694

United States of America,

Appellee,

versus

N. Dale Anderson,

Appellant.

Appeal from the United States District Court for the District of Maryland

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Upon motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court as prescribed by law within thirty (30) days or on or before January 3, 1975.

For the Court — by Direction.

WILLIAM K. SLATE, II,
Clerk.

Filed December 19, 1974.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

FIFTH AMENDMENT TO U. S. CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO U. S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions

The following statutes are involved in this case and are set forth verbatim in compliance with Rule 23(1)(d) of the Rules of this Court.

18 U.S.C. §§ 6001 through 6005 is the use immunity statute which was passed as a part of the Organized

Crime Control Act of 1970, P.L. 91-452. Each section is set forth verbatim below:

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States

Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 926.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in

which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

§ 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

§ 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any

order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 928.

The substantive criminal provisions involved in this case are the Hobbs Act, 18 U.S.C. § 1951 and 26 U.S.C. § 7201 which relates to criminal invasion of income taxes. These sections are set forth below:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce

between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Aug. 16, 1954, c. 736, 68 A. Stat. 851.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-830

N. DALE ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial because the government's case consisted chiefly of the testimony of witnesses immunized pursuant to 18 U.S.C. 6001-6005.

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of one count of conspiring to extort money under "color of official right" and twenty-seven counts of collection of such money, in violation of 18 U.S.C. 1951, and four counts of income tax evasion, in violation of 26 U.S.C. 7201 (Pet. 3). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. 28).

The evidence at trial, which is not disputed here, showed that petitioner and his principal co-conspirator,

William E. Fornoff, extorted money from businessmen in connection with architectural and engineering contracts awarded by Baltimore County while petitioner was County Executive. The evidence also established that petitioner eventually received all of the extorted money and expended it for his personal use, but did not report it on his federal income tax returns.

Petitioner's claim arises because the case is one in which, as characterized by the district court, "all of the major Government witnesses in this case were implicated in some illegal activity. * * * [I]n order to obtain their testimony, the prosecution was forced to obtain for them use immunity" (Pet. App. 21). In such circumstances, petitioner asserts that the use of the immunity statute created a "structural imbalance against a criminal defendant * * * deny[ing him] the ability to present witnesses in his own defense or to have effective assistance of counsel" (Pet. 7),[1] because "he was not granted a complimentary [*sic*] right" (Pet. 2) to grant use immunity to witnesses who would testify in his behalf.

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[1]Petitioner relies largely on a suggestion by the Chief Justice (then Circuit Judge) in *Earl* v. *United States*, 361 F.2d 531, 534 n. 1 (C.A.D.C.), rehearing *en banc* denied, 364 F.2d 666, that a defendant might be denied due process if the government "secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for [a defense witness] to free him from possible incrimination to testify for [the defendant]." See also *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (C.A. 7); *United States* v. *Leonard*, 494 F.2d 955, 985 n. 79 (C.A.D.C.) (opinion of Judge Bazelon); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (C.A. 9), certiorari denied, 411 U.S. 920; Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Colum. L. Rev. 953 (1967).

As the district court pointed out, however, petitioner never asserted the need to obtain immunity for defense witnesses during the trial, raising that issue for the first time in his motion for a new trial (Pet. App. 19). Even then, the only indication that any such witness could have given favorable testimony appears in an affidavit by one of petitioner's counsel stating that George W. Jenkins, an officer of the J.E. Greiner Company, Inc., an engineering firm, as well as other unnamed officers of that firm, were "in a position to deny" that the firm had made any payments to Jerome B. Wolff, as part of the illegal "kickback" scheme, in return for county contracts (Pet. App. 19; affidavit of William F. Gately, attached to petitioner's "Memorandum in Support of Motion for Acquittal or in the Alternative for a New Trial").[2] Even though petitioner indicates that he knew of the possibility of this allegedly favorable testimony during the trial (Pet. 7), no request was made that Jenkins be permitted to testify under a grant of immunity.

The district court rejected on the merits petitioner's claim that he was denied a fair trial, but there is no need to reach that question here. In a similar factual situation, the Fourth Circuit in *United States* v. *Gregorio*, 497 F.2d 1253, 1264, certiorari denied, November 18, 1974, No. 74-5088, declined to consider the merits of such an argument:

> * * * If a motion to grant immunity or to require the government to grant immunity had been made to the district judge, he undoubtedly would have required defense counsel to make a proffer of the wit-

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[2]Wolff testified at trial that Jenkins had authorized a bonus payment to him to reimburse him for illegal "kickback" payments he had made to petitioner.

> ness' testimony or at least to provide some relatively precise indication of what was hoped to be proved by it. Thus, defense arguments that immunity for defense witnesses in a particular case was necessary to protect the reliablility of the trial as a mechanism for ascertaining the truth, or that the absence of defense immunity in the particular case denied the defendant a fair trial, or that defense immunity was necessary under a due process fairness principle if prosecutorial immunity was accorded, could be evaluated. In addition, profferred testimony or some equivalent substitute would provide a basis for understanding and evaluating the prosecutor's argument that, upon the subsequent trial of the defense witness, it would be impossible to prove that the government's evidence was free of taint as is required under the controlling use immunity standard. Absent profferred testimony or its equivalent, we would be required to decide these issues in a factual vacuum without the views of the district judge on the credibility and importance of the defense witness' testimony in the context of the whole case. Because the issue is not ripe for decision, we decline to explore the issue of defense immunity under the "plain error" rule.

We submit that the same principle applies here. With the exception of the profferred testimony of one individual, discussed above, petitioner never made any showing in the district court, nor does he now, of the nature of the testimony of "[a]t least fifteen (15) potentially favorable witnesses for the defense" (Pet. 10). Nor has he even

shown that they would have refused to testify. In short, petitioner's contention cannot properly be decided on appeal in a factual vacuum, whatever its merits had a grant of immunity been requested and refused at trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.